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Nos. 87-1622, 87-1697, 87-1711
CONSOLIDATED

FILED
SEP 2 1988
JOSEPH F. SPANIOL, JR.,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, *et al.*,
Petitioners,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PETITIONERS COUNTY OF YAKIMA, *et al.*

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QUESTION PRESENTED

In light of *Montana v. U.S.*, 450 U.S. 544, does the Yakima Indian Nation have the authority to regulate through zoning the use of non-Indian owned fee lands located in an area of the reservation which is "open" to non-members of the Tribe and where Yakima County has exercised zoning authority over such lands for thirty-five years?

LIST OF PARTIES

Petitioners: The County of Yakima; Jim Whiteside, Graham Tollefson, and Charles Klarich, who are members of the Board of Yakima County Commissioners; Richard F. Anderwald, who is the Director of Yakima County's Planning Department; Stanley Wilkinson, a non-member of the Yakima Tribe who owns and resides on reservation land in Yakima County; and, Philip Brendale, a non-member of the Tribe who owns reservation land within Yakima County.

Respondent: The Confederated Tribes and Bands of the Yakima Indian Nation.

Jim Gatliff and Dick Keller, who at the time of trial were prospective purchasers of a portion of petitioner Wilkinson's reservation land, were aligned as defendants-appellees below and have filed a Notice of Appearance in this matter.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 828 F.2d 529 (1987) and is reprinted in the Appendix to County of Yakima's Petition for a Writ of Certiorari at page 1-A.

The opinions of the United States District Court, Eastern District of Washington, in *Whiteside I* and *Whiteside II* are reported, respectively, at 617 F. Supp. 735 (1985) and 617 F. Supp. 750 (1985) and are reprinted, respectively, in the Appendices to Wilkinson's Petition for a Writ of Certiorari at page 108a, and Yakima County's Petition for a Writ of Certiorari at page 19-A.

The District Court's orally delivered Findings of Fact and Conclusions of Law in *Whiteside II* are unreported, but are reprinted in Yakima County's Petition for a Writ of Certiorari at page 43-A. The District Court's oral opinion in *Whiteside I* is reprinted at page 40 of the Appendix to Brendale's Petition for a Writ of Certiorari.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit affirming the District Court's decision in *Whiteside I*, and reversing and remanding the District Court's decision in *Whiteside II*, was entered on September 21, 1987. Yakima County's timely petition for rehearing in *Whiteside II* was denied on January 13, 1988.

Petitioner Yakima County invoked this Court's jurisdiction to review the Ninth Circuit's Judgment pursuant to 28 U.S.C. section 1254(1). This Court granted Yakima County's Petition for Certiorari on June 20, 1988. On that same date, this Court also granted the Petitions of Brendale and Wilkinson and ordered the three cases consolidated.

TREATIES, STATUTES AND RULES INVOLVED

The Treaty with the Yakimas, 12 Stat. 951, reprinted in the County's Petition at 55-A.

The Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. section 331, et seq., reprinted in Wilkinson's Petition at 194a.

Federal Rule of Civil Procedure 52(a):

> Rule 52. Findings by the Court.
>
> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions or motions under Rules 12 or 56, or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

A. Introduction

The Confederated Tribes and Bands of the Yakima Indian Nation is an Indian tribe established by Treaty

with the United States (12 Stat. 951) with a governing body recognized by the Secretary of the Interior. Yakima County is a political subdivision of the State of Washington. The Yakima Indian Reservation is located in southeastern Washington, primarily within Yakima County. The reservation consists of approximately 1.3 million acres of land of which 80 percent is held in trust by the United States and the balance is owned in fee by members and non-members of the Tribe. The existence of "fee lands" within the exterior boundaries of the reservation is a result of the allotment policies of the Federal Government as reflected in the Treaty itself and, more importantly, the General Allotment Act (Dawes Act), 25 U.S.C. section 331, et seq.

These consolidated cases involve conflicting claims by the County of Yakima and the Yakima Indian Nation of authority to regulate the use of reservation lands owned in fee by non-members of the tribe and located in Yakima County. The consolidated cases were denominated *Whiteside I* and *Whiteside II* by the courts below and these designations have been used in the Joint Appendix herein. *Whiteside I* involves property owned in fee by petitioner Brendale within the "closed area" of the reservation.[1] *Whiteside II* involves the petitions of Yakima County, et al., and Stanley Wilkinson and concerns land owned by Wilkinson in the "open area" of the reservation. The boundary between the "open" and "closed" areas is illustrated in Exhibit 200 (J.A. 79) which is a map of the Yakima Reservation. The pattern of land tenure is also illustrated by the exhibit with fee lands

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[1] Brendale is of Yakima Indian decent, but he is not an enrolled member of the Tribe. He inherited the property at issue from his mother and grandfather who were enrolled members. The original allottee of the property was his great aunt. (Wilkinson Pet. at 123a-124a).

shaded gray in the open area and gray/green in the closed area. Allotted parcels are designated by allotment numbers.

While the closed area is not at issue in the County's case, it is necessary to briefly discuss it in order to provide the context of the lower Courts' holdings regarding the open area in *Whiteside II*. Most of the trust land within the reservation's 1.3 million acres lies within the closed area, roughly the western two-thirds of the reservation. (County Pet. 23-A; J.A. 79). Approximately 740,000 acres of the closed area is located in Yakima County of which 25,000 acres are owned in fee. Most of the fee lands are owned by non-Indian timber companies, with a single company accounting for approximately 18,000 acres. (County Pet. 24-A; Brendale Pet. App. 50). The area was declared closed to the general public by a 1954 Resolution of the Tribal Council and access is currently limited to members of the Tribe and those holding permits from the Tribe or the Bureau of Indian Affairs. Other than U.S. Highway 97, the roads in the closed area are maintained by the Bureau of Indian Affairs. The Bureau of Indian Affairs restricted use of the otherwise public roads in 1972. (Wilkinson Pet. 114a-115a).

The closed area is primarily forest land and its timber resources provide ninety percent of the Tribe's income. (Wilkinson Pet. 136a; Tr. 122-123). There are no permanent residents of that portion of the closed area located within Yakima County. The closed area also provides a source of natural foods and medicines for tribal members and plays a significant role in tribal culture and religion. (County Pet. 24-A).

B. The Wilkinson Proposal

The instant controversy began in September, 1983, when Wilkinson applied to the Yakima County Planning Department for permission to subdivide a 32-acre parcel

of reservation fee land into 20 residential lots ranging in size from 1.1 to 4.5 acres. The parcel is vacant sagebrush land located on a ridge near the northern boundary of the reservation, overlooking the Yakima Municipal Airport and the City of Yakima, which is approximately 3 miles to the north. (County Pet. 27-A-28A). Portions of the property are steeply sloped and the various lot sizes result from the need to accommodate a building site, sewage disposal system and well on each lot. (Ex. 219 at 9-10, Tr. 410).

The County applies its zoning ordinance, as well as a number of other land use regulations, to the subject property and all other fee lands located within the open area of the reservation, except within incorporated towns. The County does not apply its land use ordinances to reservation lands held in trust by the United States. The goal of the County zoning scheme as applied to Wilkinson's property and all other fee lands within the open area of the reservation is the preservation of agricultural land. (County Pet. 26-A, 27-A). Wilkinson's property is not prime agricultural land due to the steep slopes, soil types and the unavailability of irrigation water. (Tr. 248-251; Tr. 523).

The County zoning ordinance designates Wilkinson's property as "general rural" (GR). The general rural classification allows lot sizes as small as one-half acre as long as the average lot size in the subdivision equals at least one acre. The purpose of the general rural classification is to "provide protection for the County's unique agricultural resources and land base"; and "minimize scattered residential developments . . . by encouraging clustered development"; and "permit only those uses which are compatible with the rural character" of the area. (County Pet. 27-A). The general rural zone is essentially a buffer zone intended to provide protection of the more intensively used agricultural lands which are zoned either "exclusive agriculture" (EA) or "general

agriculture" (GA) under the County zoning scheme. The zone is applied to non-productive areas and contemplates a mixture of farm and non-farm uses and low density rural housing. (Tr. 44-46). Its adoption was a result of a legislative decision to focus development near the cities and away from highly productive agricultural lands. (Tr. 545).

The Yakima Indian Nation administratively challenged the County's jurisdiction to regulate land use on the subject property and also the adequacy of the County's environmental review of the proposal. The County had originally required the preparation of an environmental impact statement, but removed the requirement when Wilkinson agreed to modify his proposal to mitigate or prevent potential environmental impacts. (County Pet. 28-A). The Yakima Indian Nation received notice of the proposal as a "consulted agency" under the County's Environmental Policy Ordinance (Tr. 494-495).

The Tribe claimed exclusive authority to regulate the use of all land within the reservation, including that owned in fee by non-members. The Tribal Zoning Ordinance designated the Wilkinson property as "agricultural". The agricultural designation allowed the contemplated residential usage but required minimum lot sizes of at least five acres. Like the County's, the goal of the Tribal Zoning Ordinance as applied to the Wilkinson property and other properties in the open area is the preservation of agricultural land. (County Pet. 25-A; Tr. 36).

The Tribe's administrative appeal was heard by the Board of Yakima County Commissioners on October 25, 1983. Based upon advice from the County Legal Department, the Board of County Commissioners limited the hearing to consideration of the environmental impacts of the proposal although the Tribe argued the jurisdictional issue during the early stages of the hearing. Following the presentation of testimony and the cross examination

of witnesses, the County Commissioners concluded that the Wilkinson proposal, as modified, would not have a significant environmental impact and did not require the preparation of an environmental impact statement.[2]

The Yakima Indian Nation commenced this litigation in the United States District Court for the Eastern District of Washington on October 28, 1983. The jurisdiction of the court was invoked pursuant to 28 U.S.C. section 1362. The Tribe joined as defendants the County of Yakima, the Board of Yakima County Commissioners (Whiteside, Tollefson and Klarich), the Director of the County Planning Department (Anderwald), Stanley Wilkinson, and a Jim Gatliff and Dick Keller who were prospective purchasers of Wilkinson's land. Along with relief under 42 U.S.C. section 1983 and a pendent claim under the Washington Environmental Policy Act, the Tribe sought a "declaratory judgment declaring the rights of the parties regarding land use and entry regulations within the exterior boundaries of the Yakima Indian Reservation". (J.A. 35).

The Tribe's lawsuit in *Whiteside I*, seeking essentially the same relief, except for the pendent claim, was pending in the District Court at the same time, having been filed on September 12, 1983. (J.A. 13). The cases were tried separately. Ultimately, the District Court found that the Tribe had exclusive land use jurisdiction in the closed area in *Whiteside I* and that the County had

[2] The transcript of the hearing held before the Board of Yakima County Commissioners is in the record as Exhibit 219, Tr. 410. The written findings of fact, conclusions of law and order isued by the Board are in the record as Exhibit 222, Tr. 267. The exhibits considered by the Board at the hearing are in the record as Exhibits 221-1 through 221-27, Tr. 267. The Washington State Environmental Policy Act, Revised Code of Washington Chapter 43.21C, requires testimony under oath, written findings and conclusions, and the establishment of a permant record, in administrative appeals of environmental decisions.

exclusive land use jurisdiction over fee lands in the open area in *Whiteside II*.

Much of the testimony and evidence adduced during the trial on the merits in *Whiteside II* concerned the nature of the open area of the reservation, the regulatory interest of the two governments over the fee lands, and, the nature and quality of the land use regulations of the two governments as applied to the fee lands in light of the common goal of agricultural preservation. Such evidence might, at first blush, seem irrelevant to the determination of a purely jurisdictional question. However, in the field of Indian law, and particularly in light of this Court's ruling in *Montana v. U.S.*, 450 U.S. 544 (1981) such evidence is crucial to the question and requires elaboration at some length.

C. The Open Area

Most of the fee lands within the Yakima Indian Reservation are concentrated in the northeastern portion of the reservation within the "open area". As the name implies, there is no limitation of access to this part of the reservation and non-tribal members move freely throughout the area. Indeed, Yakima County maintains approximately 500 miles of public roads in this portion of the reservation. (County Pet. 6-A).

The open area consists of approximately 350,000 acres of land in Yakima County of which about half is owned in fee. (County Pet. 44-A, 45-A, 24-A). The population of the open area is approximately 25,000, of which 5,000 are Indians.[3] There are three incorporated cities within the open area: Harrah, population 345; Toppenish, population 6,575; and Wapato, population 3,110. (County Pet. 29-A; Tr. 358). In the immediate area of the Wilkinson property, the north side of Ahtanum Ridge near the res-

[3] The Yakima Indian Reservation is the third most populated reservation in the United States according to 1980 census data.

ervation's northeastern boundary, there are 48 Indian residents and 484 non-Indian residents. (Tr. 154).

Most of the open area is range and irrigated farmland, but residential and commercial uses also exist, primarily near the cities. (County Pet. 24-A). The fee lands lie within the three incorporated cities and are scattered in the now familiar checkerboard fashion throughout the balance of the open area. (County Pet. 23-A). *See*, Ex. 200, J.A. 79, illustrating the pattern of land tenure.[4]

Yakima County is one of the leading agricultural counties in the United States, ranking in the top twenty in agricultural income. At the time of trial, total agricultural production for the County was estimated at approximately $350,000,000.00 per year based upon statistics from 1982 and 1983. The County is a leading producer of high value crops, such as apples, cherries, grapes, mint, and hops, and is also a major producer of wheat and cattle. The County contains 358,000 acres of cropland of which 330,000 are irrigated, accounting for twenty-five percent of all irrigated land in the state of Washington. (Ex. 244, at 1-5, Tr. 425; Tr. 415-417; Tr. 420; Tr. 424). Every dollar of farm income "turns over" about three times within Washington state, mostly within the county of origin as it is spent for debt service, new equipment, repairs and maintenance, new buildings, chemicals and fertilizers, and the like. Viewed in that light, agriculture in Yakima County is a billion dollar a year industry. (Ex. 244, at 2, Tr. 425).

The open area of the Yakima Indian Reservation plays a significant role in Yakima County's agricultural economy. Slightly less than one-third, approximately $105,000,000.00 annually, of the County's total argicultural production is attributable to open area reservation lands. (Exhibit 244 at 1, Tr. 425; Tr. 416-417). The reservation contains 143,000 acres of irrigated land, well over one-third of the County's total. Of the 143,000 irrigated acres within the reservation, 63,179 are owned in fee by non-members of the Tribe, and 63,466 are leased to non-members of the Tribe. (Tr. 418; Tr. 422). The irrigated reservation fee land owned and farmed by non-members yields greater than fifty percent of the agricultural income attributable to lands within the reservation even though it comprises less than fifty percent of the reservation's irrigated acreage because it is planted in permanent crops such as apples. (Tr. 422-423).

[4] This Court previously considered the population and pattern of land tenure of the Yakima Indian Reservation in *Washington v. Confederated Tribes and Bands of the Yakima Indian Nation*, 439 U.S. 463, 469-470 (1979).

The Yakima Indian Nation does not derive significant income from the agricultural activities carried out in the open area. As previously indicated, ninety percent of the Tribe's income comes from its timber resources located in the closed area. (Tr. 123; Tr. 148; Tr. 149). Individual members of the Tribe holding allotments within the open area do derive income by leasing their allotted property, generally to non-Indian farmers. (Tr. 123; Tr. 148). Also, members of the Tribe are employed in agricultural support industries. (Tr. 123).

In addition to the road system previously mentioned, Yakima County provides a full range of governmental services to the open area of the reservation. The County services offered to reservation residents are precisely the same as those offered to other areas of the county and are available to both Indians and non-Indians without discrimination. (Tr. 546-547). All adult residents of Yakima County, Indian and non-Indian, are eligible to vote in County elections. (Tr. 169). The non-Indian owners of fee lands within the open area of the reservation look to Yakima County for governmental services. (Tr. 555).

At the time of trial, Yakima County collected property taxes on all fee lands within the reservation. Those lands

included 10,467 separate parcels with an assessed valuation of $421,167,325.00, approximately ten percent of the County's total tax base. (Ex. 217, Tr. 410; Ex. 218, Tr. 410).[5]

The Yakima Indian Nation also offers governmental services to the open area of the reservation. (Tr. 126-130). However, as testified to by a tribal council member, while these services are theoretically open to all, they actually only serve Indian residents of the reservation. (Tr. 143-144). The two governments cooperate in providing police protection to the open area. (Tr. 286; Tr. 291).

D. Yakima County Land Use Regulation Within the Open Area

Yakima County has exercised land use jurisdiction over fee lands within the open area of the reservation for over thirty-five years, which is precisely as long as the County has exercised land use jurisdiction generally. (County Pet. 44-A, 26-A; Tr. 437-459). The County has never attempted to regulate the use of trust lands. (County Pet. 27-A). The nature of the various County land use regulations and the history of their application to open area reservation lands is briefly described as follows.

1. *Comprehensive Plans*

Under Washington's statutory scheme, RCW 36.70, the Planning Enabling Act, a comprehensive plan, is a general guide for the growth and development of the County. It serves as the basis for the adoption of official land use controls, such as zoning and subdivision regulations. (Tr. 439-440).

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[5] On May 10, 1988, Judge Alan A. McDonald of the Eastern District of Washington entered a Judgment enjoining the County from taxing reservation fee land owned by tribal members. *Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, et al.*, No. C-87-654-AAM. That case is currently on appeal to the Ninth Circuit. Docket No. 88-3926.

The first comprehensive land use plan for the County was adopted in December, 1967. The land use map contained within the plan designated the Yakima Indian Reservation as predominantly forest watershed and general agriculture. A major updating of the plan occurred in 1977, however, the predominant land use designations within the Yakima Indian Reservation remained unchanged. (Tr. 439).

There are three incorporated municipalities within the exterior boundaries of the Yakima Indian Reservation: Toppenish, Wapato and Harrah. In order to provide more specific policies for guiding land use decisions on fee lands within and surrounding those cities, the County and the municipalities have jointly adopted sub-area plans for each community. (Tr. 443-444). The Toppenish sub-area plan was adopted in September of 1980 (Ex. 208, Tr. 347), the Harrah sub-area plan was adopted in March of 1981 (Ex. 209, Tr. 344), and the Wapato sub-area plan was adopted in May of 1981 (Ex. 210, Tr. 344). These plans focus on the special circumstances surrounding each community and are supplements to the 1977 General Comprehensive Plan.

In March of 1981, the County adopted the Rural Land Use Plan as a supplement to the Comprehensive Plan. (Ex. 207, Tr. 347). The focus of the plan is on Yakima County's rural areas and its purpose is to provide policy guidelines for preserving the County's agricultural economic base. The plan served as a basis for the adoption of major text and mapping amendments to the Zoning Ordinance. (County Pet. 26-A, 30-A).

2. *Zoning*

Yakima County began regulating land use activities in 1946 under the terms of a temporary zoning resolution. Special permits were required for nuisance activities and building permits were required for all structures within the unincorporated areas of the County. Six "special

nuisance permits" were issued for fee lands within the Yakima Indian Reservation under the terms of this original code. (Tr. 437-438).

The County's first zoning ordinance was adopted in 1965 (Ordinance 1-1965) and was applicable to "all lands within the boundaries of Yakima County lying outside the limits of any incorporated city or town". All such lands were zoned "general use" and all activities not expressly prohibited were permitted outright except for certain potentially noxious uses which required conditional use permits. Conditional use permits for such uses as a blood plant, an oil bulk plant, and several feedlots, were processed for fee lands within the exterior boundaries of the reservation under the terms of the 1965 Ordinance. (Tr. 438-439).

The County's first comprehensive zoning ordinance was adopted in January of 1972. (Ex. 212, Tr. 344; Tr. 440). The ordinance established nine new use districts generally regulating agricultural, residential, commercial, industrial and forest watershed uses. The ordinance also regulated non-conforming uses, provided for special property uses and established a Board of Adjustment to hear variance and special property use applications.

After the 1972 ordinance was successfully challenged on procedural grounds, it was readopted in essentially the same form in October of 1974. Lands within the Yakima Indian Reservation boundary were clearly distinguished on the official zoning map as being either fee or trust lands. (County Pet. 26-A).

Major mapping and text changes were adopted in March of 1982 to implement the Rural Land Use Plan supplement to the County Comprehensive Plan. The most significant change was the replacement of the single "agricultural" use district with three new and and more restrictive agricultural zones, "exclusive agricultural", "general agricultural" and "general rural". The vast

majority of fee lands within the Yakima Indian Reservation which were located in the former "agricultural" district were designated "exclusive agricultural", the most restrictive of the three new zones. The "exclusive agricultural" district is intended to preserve and maintain areas for the continued practice of agriculture and to permit only those new uses which are compatible with agricultural activities. The minimum lot size in this district is 40 acres, with limited exceptions. Generally, the exceptions permit the creation of one new lot, at least one-half acre in size, but not greater than two acres in size, once every five years. (Ex. 246, Tr. 471; Ex. 200, Tr. 29; Tr. 447-453; County Pet. 26-A - 27-A).

The "general agricultural" use district contains virtually the same restrictions as the "exclusive agricultural", except that the minimum lot size is 20 acres. (County Pet. 26-A). The characteristics of the "general rural" zone were discussed above.

Since 1974, the following land use decisions have been made by Yakima County concerning fee lands within the open area of the reservation:

Special Property Use Permits—42 files processed dealing primarily with mobile homes, surface mining, churches, firestations, day care centers.

Rezones—11 files processed including various zoning classifications and uses.

Variances—19 files processed mostly involving building set backs or lot sizes.

Building Permits—780 issued since 1972. (Tr. 498; Tr. 538).

3. *Subdivisions*

Yakima County adopted its first comprehensive subdivision ordinance in November of 1974, Ordinance No. 10-1974, Yakima County Code Title 14. (Ex. 213, Tr. 344). Prior to that time, the County reviewed and approved plats under the authority of RCW 58.17 and

its predecessor statutes. (Tr. 453). The County Subdivision Ordinance requires that the subdivision of land conform with adopted standards for streets, water, sewage, drainage, parks and recreation areas, school sites and the like. (County Pet. 27-A).

Since 1960, the County has processed and approved fourteen long plats creating approximately 250 lots on lands within the exterior boundaries of the Yakima Indian Reservation, including one plat submitted by the Tribe for some of its land located near White Swan, Washington. (Tr. 455). Since 1975, the County has administratively processed 148 short plats of fee lands on the reservation and 90 short plat exemptions have been authorized concerning such matters as boundary line adjustments and financial segregations.[6]

4. *Shorelines*

Since 1974, as mandated by state law, the County has had a Shorelines Master Program regulating the use of shorelines within the County, including those of the Yakima River and Ahtanum Creek on the reservation. The County has processed several shorelines permits for surface mining activities on fee lands along the shorelines of the Yakima River on the reservation. (Ex. 214, Tr. 344; Tr. 496).

5. *Federal Flood Insurance Program*

Since 1974, the County has participated in the Federal Flood Insurance Program administered by the Federal

[6] A "short plat" is the division of land into four or fewer parcels. Under Washington's statutory scheme, such divisions are administratively approved provided they comply with other land use regulations and applicable development standards. (Tr. 456-457)

A "long plat" is the division of land into five or more parcels. It is a more formalized process involving public hearings, notice to surrounding property owners, approval by the Board of County Commissioners, and the application of generally higher development standards. (Tr. 455-456).

Emergency Management Agency. The program regulates the development of flood-prone areas and applies to fee lands within the Yakima Indian Reservation. The County's participation in the program enables County residents to purchase flood insurance. (Tr. 497).

6. *State Environmental Policy Act (SEPA)*

All non-exempt land use decisions made by Yakima County are subject to environmental review under the provisions of the State Environmental Policy Act, RCW 43.21C.

E. Tribal Zoning Regulations

The Tribal Zoning Ordinance is its only land use control. The initial Tribal Zoning Ordinance was adopted in 1970 and was patterned after the then existing County Ordinance. (County Pet. 24-A). The current ordinance was adopted in 1972 and has apparently not been amended since. (Ex. 006, Tr. 28; J.A. 38). The ordinance establishes five use districts generally regulating agricultural, residential, commercial, industrial and reservation restricted area uses. It also provides for planned developments and special property uses in designated zones. The ordinance is administered by the zoning administrator and the Tribal Council sitting as the Board of Adjustment. Except for the five-acre minimum lot sizes in the agricultural district and the reservation-restricted zone, the ordinance is virtually identical to the ordinance adopted by Yakima County in 1972. (Tr. 193-194).

Under the administrative scheme established by the ordinance, applications are first submitted to the tribal zoning administrator. The application fee is $5.00. (Tr. 120). The administrator has authority to approve applications except for special property use permits and variances which are referred to the Tribal Council. No on-site inspections are conducted for building permits issued by the administrator concerning fee lands. (Tr. 202).

The Tribal Council, sitting as the Board of Adjustment, has authority to hear appeals from determinations of the zoning administrator and to issue variances and special property use permits. (J.A. 50). The Board of Adjustment's decisions are final as there is no right of appeal, either administrative or judicial, from its decisions. (Tr. 158). Section 10 of the Tribal Ordinance concerning appeals of Board of Adjustment decisions reads as follows:

> SECTION 10, APPEAL FROM THE BOARD OF ADJUSTMENT
>
> Nothing in this ordinance shall be construed to be a waiver of sovereign immunity by the Yakima Indian Nation and its officers and agents. (J.A. 54).

Section 16 of the Ordinance establishing penalties for violation provides for the enjoining of non-conforming uses and, "in extreme cases" the expulsion of violators from the reservation. (J.A. 56).

While the terms of the 1972 Ordinance make it applicable to all land within the reservation, the Tribe has "not opted" to attempt to exercise zoning jurisdiction within the incorporated cities although it claims the authority to do so. (Tr. 117; Tr. 194-196). The Tribe's official zoning map of 1973 contained on page 103 of Exihbit 8 (Tr. 28; Tr. 193-194) shows tribal zoning of the cities.

Since 1972, the Tribe has processed 883 land use applications of which 317 were submitted by non-members of the Tribe. Of those 317, approximately 16 were for variances and three for planned developments with the balance being, apparently, simple building permits. (Tr. 118-119).

The Tribe does not attempt to regulate the subdivision of land other than through the variance process. A number of the applications processed by the Tribe concern variances from the five-acre minimum lot size in the agricultural zone. (Tr. 161). Under the tribal regulatory scheme, lands located within the agricultural zone could be completely subdivided into five acre parcels without tribal review of any kind or the application of any development standards. (Tr. 171).

In addition to the Tribe's efforts at regulating land use, several tribal witnesses, notably Tribal Council member Anthony Washines, testified concerning the Tribe's efforts to reacquire fee land and return it to trust status. As of the time of trial, the Tribe had expended $54,000,000.00 in that pursuit. (Tr. 109-110; Tr. 317).

F. Proceedings Below

Following the trial on the merits in *Whiteside II*, the District Court found that the Yakima Indian Nation was without authority to exercise regulatory land use jurisdiction over non-Indian fee lands within the open area of the reservation. The court held that the issue of tribal authority was determined by the test set forth in *Montana v. U.S.*, 450 U.S. 544 (1981). That is, inherent tribal sovereignty generally does not extend to the activities of non-members of the tribe on fee lands absent a consensual relationship or unless the non-members' conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

The District Court discussed in general terms the differences between the open and closed areas and also made specific findings of fact in both its oral and written opinions. (County Pet. 43-A - 46-A; 23-A - 31-A). Several of the court's findings are particularly noteworthy: (1) The County has exercised zoning jurisdiction over fee lands in the open area for thirty-five years without legal challenge from the tribe prior to the Wilkinson project; (2)

The County zoning scheme as applied to the fee lands in the open area is more protective of agricultural lands than the Tribe's; (3) The trust land in the vicinity of the Wilkinson property is not a significant source of food for members of the Yakima Indian Nation and the proposed development does not threaten the food source of members of the Tribe; (4) The County's regulation of the Wilkinson property does not in any way threaten the economic security of the Tribe; (5) In contrast to the closed area, the open area is not of unique religious or spiritual significance to members of the Yakima Nation. (County Pet. 45-A; 30-A). The court concluded:

> "As stated in the Findings of Fact, this court finds that Wilkinson's proposed development does not pose a threat to the 'political integrity', the 'economic security' or the 'health and welfare' of the Yakima Nation. The mere fact that the Tribe's Zoning Ordinance differs in some respects from that of Yakima County does not rise to the level of a 'threat' to the Tribe. As applied to the 'open area', Yakima County's zoning ordinance will adequately regulate the land use of the fee lands and not pose a threat to the trust lands. Consequently, this court must conclude that the Yakima Nation is without authority to exercise regulatory jurisdiction over Wilkinson's 'Open Area' free land." (County Pet. 37-A).

In reaching his decision, the trial judge was cognizant of a sincere desire by the Tribe to reacquire fee lands and, by so doing, reverse the effects of the allotment process. In rendering his oral opinion, the trial judge made it clear that he was not unsympathetic to those desires, but that he was mandated to decide the case by the principles of law established by the decisions of this Court and the enactments of Congress:

> In utilizing the *Montana* standards, I am not unmoved by the desire of the Tribe and the Members thereof to have its treaty lands returned to it, but that does not, in my opinion, justify my findings that

> such a desire constitutes a threat to the political integrity, the economic security, or the health or welfare of the Tribe and its Members. (County Pet. 50-A).
>
> I am unable to find that the desire, the sincere desire of the Tribe and its Members to have the deeded land restored to it is such as interferes with the political integrity, the economic security, or the health or welfare of the Tribe and its Members. Once again, that is a matter for the legislative branch, not the judicial branch to determine. (County Pet. 51-A).
>
> I suggest to the Yakima Indian Nation that despite your sincere belief that all the land within the exterior boundaries should be returned in accordance with the Treaty of 1855, that that may be some time in coming. I think you recognize that that is a matter for the legislative branch of this government to decide; to-wit: Congress. (County Pet. 52-A).

Finally, in the same oral opinion, the judge explained why his ruling in *Whiteside I*, wherein he found the Tribe had exclusive regulatory jurisdiction, was just the opposite from that in *Whiteside II*. He stated:

> While this case [*Whiteside II*] also involves land within the exterior boundaries of the Yakima Indian Reservation, the factual circumstances in the two cases are strikingly different. They are as different, in my opinion, as night and day. (County Pet. 44-A).

The Ninth Circuit Court of Appeals affirmed *Whiteside I*, but reversed *Whiteside II*, holding that the tribe retained both treaty reserved and inherent sovereignty to regulate land use on fee lands owned by non-members in the open area as a matter of law under *Montana v. U.S., supra.* In so holding, the court did not find erroneous pursuant to Cr 52(a) any of the findings of the District Court. Rather, the court held that since the Tribe admittedly has exclusive authority to zone trust lands, it must

also have authority over fee lands in order to engage in comprehensive planning:

> Further, a major goal in zoning is the "systematic and coordinated utilization of land" in a particular area. N. Williams, *American Land Planning Law*, section 1.06 (1974), *cited in* Comment, 53 Wn. L. Rev. at 679. Comprehensive planning enables a centralized regulatory authority to balance the competing needs of landowners and to distribute land uses in a desirable pattern. *Id.* at section 1.08, *cited in* Comment, 53 Wn. L. Rev. at 685. Yakima Nation has exclusive authority to zone tribal trust land, which constitutes nearly all of the closed area and over half of the open area. Although the fee land owned by non-Indians is clustered primarily in one part of the reservation, the reservation still exhibits essentially a checkerboard pattern. If we were to deny Yakima Nation the right to regulate fee land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning, so fundamental to a zoning scheme. This we are unwilling to do. (County Pet. 13-A).

The Court held that since zoning is a proper exercise of the police power precisely because it is designed to promote the health and welfare of citizens, it is per se within the ambit of the exception to the *Montana* rule regarding non-Indian conduct which threatens tribal health or welfare. (County Pet. 11-A - 12-A).

The Court of Appeals did not rule that County regulation of fee land was preempted by federal law or policy. It concluded that based upon the status of the record it could make no finding on the issue. It remanded the case to the District Court to make findings concerning the County's regulatory interest pursuant to the preemption/balancing of interest analysis of the *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980) line of cases. Apparently, concurrent jurisdiction would exist if the District Court found in favor of the County on remand.

The Mandate of the Ninth Circuit has been stayed pending review by this Court. (J.A. 9, 10).

SUMMARY OF ARGUMENT

There are no federal statutes which authorize the zoning of fee lands on the reservation, nor are there any treaty derived rights granting such authority. In fact, the policy of the federal government has been to divest the tribes of any regulatory control over non-Indians on fee land. This policy is reflected in the General Allotment Acts and the case law reviewing its effects. As a result, any treaty reserved right is limited to those lands still set aside for "exclusive use" of the tribe, the trust lands.

There has been implicit divestiture of tribal sovereignty in those areas involving the relations between Indian tribes and non-members. The essence of inherent sovereignty is primarily internal, generally consisting of the power to punish tribal offenders, determine tribal membership, regulate domestic relations among members and prescribe rules of inheritance. As a result, a tribe can exercise civil regulatory control over a non-member only if there is a consensual relationship or the non-Indian's conduct will have "some direct effect on the political integrity, the economic security, or the health or welfare of the tribe". *Montana*, 450 U.S. at 566.

The Ninth Circuit determined that since zoning is an exercise of the police power, which by definition is the power to promote public health, safety and welfare, the Tribe has such power regardless of any factual finding concerning its necessity. This reading of *Montana* causes the exception to swallow the rule in that it would grant tribes virtually unlimited police power jurisdiction over the conduct of non-members on fee lands.

The undisturbed finding of the District Court clearly establish that the circumstances necessary to confer tribal

jurisdiction are absent in *Whiteside II*. The County has not abdicated or abused its responsibility of regulating the fee lands and that regulation does not threaten, but in fact protects, tribal interests.

Jurisdiction based on land tenure classification is neither irrational nor arbitrary and protects the interests of both Indians and non-Indians. The time has come for this court to establish a bright-line test for civil regulatory control over the land within Indian reservations. The states and their political subdivisions should control the fee land and the tribes should control the trust lands. This rule would give effect to existing federal laws, the treaties and state laws. It would insure that rights of the non-Indians were protected while protecting the interests of the tribes and their members.

ARGUMENT

I. Introduction.

Initially, we recognize that Indian tribes are "unique aggregations possessing the attributes of sovereignty over both their members and their territory". *United States v. Mazurie*, 419 U.S. 544, 557 (1975). As such, Indian tribes constitute political communities enjoying some sovereign powers over both members and non-members within reservation boundaries. *Williams v. Lee*, 358 U.S. 217, 223 (1959). We are also cognizant of the federal government's long standing policy of encouraging tribal self-government, a principle which has been repeatedly reiterated by this court. *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987).

It is not our contention, then, that there are no conceivable set of circumstances under which a non-Indian, even on fee land, will be subject to some form of tribal jurisdiction. It is our contention that the Ninth Circuit's decision in *Whiteside II* constitutes a signficant distortion of this Court's teachings concerning the limitations of

tribal sovereignty over non-members, and is in direct conflict with the will of Congress as expressed in the Allotment Acts.

The scope of tribal sovereign powers, particularly as related to the activities of non-members on fee lands, has been discussed most thoroughly in the case of *Montana v. U.S.*, 450 U.S. 544 (1981). While reaching opposite results, both the District Court and the Court of Appeals agreed that this case is controlled by the *Montana* test. Accordingly, we will begin our discussions with an analysis of the *Montana* decision as it relates to the facts and circumstances of *Whiteside II*.

II. The Federal Policy of Land Allotment Has Divested the Yakima Tribe of Any Treaty Rights to Regulate the Use of Non-Member Owned Fee Land Within the Open Area of the Reservation.

Montana involved the assertion of tribal authority over hunting and fishing by non-members on fee lands within the Crow Reservation in Montana. The State likewise asserted jurisdiction to license and regulate non-members of the Tribe on fee lands within the boundaries of the reservation. This Court held that there was no tribal jurisdiction to so regulate the non-members and explicitly recognized the power of the State to continue its regulatory activities.

The issue here, as in *Montana*, is whether a tribal law can and should preempt state and local laws. It should be noted that while the County's zoning ordinance is the only specific law at issue in this action, the Ninth Circuit's ruling will also effect a number of other state laws, implemented by local ordinances, concerning comprehensive planning and land use. As a result of the Ninth Circuit's opinion, the following state laws will no longer have any effect on the Yakima Reservation: Plats-Subdivisions-Dedications, RCW 58.17; Shoreline Management Act of 1971, RCW 90.58; State Environmental Policy Act, RCW

43.21C. What powers do Indian tribes possess that would permit such a result?

"The powers possessed by Indian tribes stem from three sources: Federal statutes, treaties, and the tribe's inherent sovereignty." *Merrion v. Jicarilla*, 455 U.S. 130, 168 (1982). (Stevens, J., dissenting) No federal statute authorizes or directs the Yakima Indian Nation to zone fee land on the Yakima reservation. Such power, if it exists, must be based upon the Treaty or inherent sovereignty.

With regard to treaty derived power, this Court in *Montana* stated that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands". 450 U.S. at 561, citing *Puyallup Tribe v. Washington State Department of Game*, 433 U.S. 165 (1977) (*Puyallup III*). Noting that the main cause of the alienation of tribal lands was the Allotment Acts, the Court found that Congress specifically intended the divestiture of tribal jurisdiction over such lands. "There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the Congressional debates, allotment of Indian land was consistently equated to the dissolution of tribal affairs and jurisdiction." 450 U.S. at 559-60, n.9. The Court continued: "It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when the avowed purpose of the allotment policy was the ultimate destruction of tribal government". *Ibid.*

The *Montana* Court was cognizant of the fact that the allotment policy is now discredited and was repudiated in 1934 by the passage of the Indian Reorganization Act, 48 Stat. 984, at 25 U.S.C. section 461, et seq. The Court found, however, that the repudiation was not

relevant in the analysis of the effect of the land alienation occasioned by the allotment policy on Indian treaty rights tied to Indian use and occupation of reservation lands which are, in fact, no longer used or occupied by Indians. *Montana*, 450 U.S. at 559, n.9. Notwithstanding the Indian Reorganization Act, the intended effects of the allotment policy continue and must be addressed in light of present realities.

The salient provisions of the Treaty with the Yakimas are very similar to the Fort Laramie Treaty, 15 Stat. 649, at issue in *Montana*. Article 2 of the Yakima Treaty creates a reservation for the "exclusive use and benefit" of the Confederated Tribes. (County Pet. 56-A). Article 2 of the Fort Laramie Treaty reserves land for the "absolute and undisturbed use and occupation" of the Crow Tribe. Both treaties contain assurances against non-Indian settlement of the reservations without tribal consent. In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), this Court found that similar provisions in the Navahoe Treaty of 1868 were meant to establish the lands within the reservation as within the exclusive sovereignty of the Tribe under general federal supervision. 411 U.S. 174-175. Tribal sovereignty, at least as defined by the Treaty, is grounded in the "exclusive use" language.

Obviously, however, intervening federal policies as implemented by the Allotment Acts have resulted in large numbers of non-Indian residents and landowners on the Yakima Reservation. Any treaty reserved right to regulate land use is limited to those lands still set aside for the "exclusive use" of the Tribe, the trust lands. The Yakima Treaty contains no explicit grant of sovereignty over fee lands and cannot sustain tribal jurisdiction over non-Indian conduct on such lands any more than the Fort

Laramie Treaty in *Montana* or the Treaty of Medicine Creek in *Puyallup*.[7]

III. The Yakima Indian Nation's Inherent Sovereign Power Does Not Generally Extend to the Activities of Non-Indians on Fee Lands and Will Not Sustain Tribal Land Use Jurisdiction Over Such Lands.

Finding no treaty derived power for the Crow Tribe to exercise regulatory authority over the activities of non-members on fee lands, the *Montana* Court then considered whether the Tribe's "inherent sovereignty" would sustain such jurisdiction. The Court cited *United States v. Wheeler*, 435 U.S. 313 (1978) for the proposition that there has been an implicit divestiture of tribal sovereignty in those areas involving the relations between an Indian tribe and non-members of the tribe. The Court found the essence of inherent sovereignty to be primarily internal, describing it as a power to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members and to prescribe rules of inheritance. 450 U.S. at 564. The court noted the extremely limited nature of the power: "But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation". 450 U.S. at 564. "The sovereignty that the Indian tribes retain is of a unique and limited character, exists only at the sufferance of Congress and is subject to complete defeasance." *United States v. Wheeler, supra*, at 323.

The limited and primarily internal nature of tribal sovereignty is founded, primarily on the inability of non-

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[7] The Court of Appeals' decision quotes the Yakima Treaty as guaranteeing the Tribe the right to "its own government" and "its own laws". (County Pet. 10-A). The quoted language does not appear in the Treaty.

members to participate politically in tribal government. In *State of Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Court sustained Washington's power to tax cigarette sales to Indian residents of the Colville Reservation who were non-members of the governing tribe. The Court held that the imposition of Washington's tax on these purchasers would not contravene the principle of tribal self-government, "for the simple reason that non-members are not constituents of the governing tribe". 447 U.S. at 161. The Court continued "there is no evidence that non-members have a say in tribal affairs or significantly share in tribal disbursements". *Ibid.* "The traditional immunity is not based on race, but accouterments of self-government in which a non-member does not share." (Rehnquist, J., concurring and dissenting) 447 U.S. at 187.

Likewise, in *Rice v. Rehner*, 463 U.S. 713 (1983), the Court found that state regulation of liquor sales to non-Indians or non-members of the Pala Tribe by a federally registered Indian trader did not contravene the principles of tribal self-government. "If there is any interest in tribal sovereignty implicated by imposition of California's alcoholic beverage regulation, it exists only insofar as the state attempts to regulate retail sales of liquor to other members of the Pala Tribe on the Pala Reservation." 463 U.S. at 721 (1983).

The *Montana* Court found that regulation of hunting and fishing by non-members on lands no longer owned by the Tribe bore "no clear relationship to tribal self-government or internal relations" and thus could not be sustained under the general principles of tribal sovereignty. 450 U.S. at 564. The Court bolstered its general finding by citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) which held that an Indian tribe

had no criminal jurisdiction over non-Indians.[8] The Court found: "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe." 450 U.S. at 565.

The Court found, generally, that inherent tribal sovereignty over the conduct of non-members on fee lands exists only when the non-members have entered consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements.[9] 450 U.S. at 565. However, the Court qualified its holding in a way which has led substantially to the confusion which we now face. The Court stated: "The Tribe *may* also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. (Emphasis added).

The meaning of this paragraph is the heart of the issue in *Whiteside II*. The Ninth Circuit reads it as meaning that "a tribe also retains" such power over non-Indians on matters concerned with health and welfare. (County Pet. 11-A). Since zoning is an exercise of the police

[8] The Court noted that lack of criminal jurisdiction would seriously restrict a tribe's ability to regulate non-Indian hunting and fishing. 450 U.S. 565 n.14. That point is equally valid concerning tribal regulation of land use by non-Indian fee owners.

[9] The two recent cases dealing with tribal court civil jurisdiction over non-Indians, *National Farmers Union Insurace Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987) fit comfortably within this exception to the *Montana* rule. Both involved insurance companies which chose to do business on a reservation. *National Farmers* involved insurance coverage of a state owned school on a reservation attended by predominantly Indian children, and *Iowa Mutual* involved insurance coverage of an Indian owned ranch.

power, which by definition is the power to promote public health, safety and welfare, the Court of Appeals concludes that tribes have such power regardless of any factual finding concerning its necessity. This reading of *Montana* causes the exception to swallow the rule in that it would grant tribes virtually unlimited police power jurisdiction over the conduct of non-members on fee lands.

The fish and game regulations at issue in *Montana* were themselves police power regulations. *Lawton v. Steele*, 152 U.S. 133 (1894). That fact alone negates any conclusion that *Montana* equated the concept of inherent tribal sovereignty with traditional governmental police powers. Moreover, the language of the key paragraph, the so-called "second exception" to *Montana*, is obviously more tentative and was not intended to impose tribal authority in all areas involving health, safety or welfare. The tribe "may" retain "power to exercise civil authority". Such permissive power is dependent first on a showing that the activity of the non-Indians in question may pose a threat to or have some "direct effect on the political integrity, the economic security, or the health or welfare of the tribe". Second, assuming such a showing can be made, the tribe must show that those real tribal interests are, in fact, endangered by the activities of non-members; i.e., without protection by other entities with jurisdiction, such as county, state or federal governments.

The *Montana* Court indicated that the existence of state regulation of non-Indian conduct on fee lands is relevant in determining tribal power over non-members. The court noted that the Tribe had "accommodated itself to the state's near exclusive regulation of hunting and fishing on fee lands within the reservation". 450 U.S. 565. The Court further found that there had been no showing that the state had "abdicated or abused its responsibility" for protecting and managing wildlife or that non-Indian hunting and fishing on fee lands imperiled the

subsistence or welfare of the Tribe. 450 U.S. 544, n.16. The Court finally noted that Montana's regulatory scheme did not prevent the Crow Tribe from regulating hunting and fishing on the trust lands in reaching its conclusion that the Tribe's political integrity or economic security was not threatened by state regulation. 450 U.S. at 566, 567.

The District Court in *Whiteside II* made precisely the same findings, undisturbed by the Court of Appeals, concerning Yakima County's regulation of fee lands within the open area of the reservation: The County has exercised zoning jurisdiction over fee lands in the open area for 35 years without legal challenge from the tribe prior to the Wilkinson project; the County zoning scheme as applied to fee lands is more protective of agricultural lands than the Tribe's; the trust land in the vicinity of the Wilkinson property is not a significant source of food for members of the Tribe; the County's regulation of the Wilkinson property does not in any way threaten the economic security of the Tribe; in contrast to the closed area, the open area is not of a unique religious or spiritual significance to members of the Tribe; the County zoning ordinance will adequately regulate the fee lands and not pose a threat to the trust lands. (County Pet. 45-A; 30-A; 37-A). Yakima County cannot be said to have abdicated or abused its responsibility of regulating land use on the fee lands within the open area.

Montana requires a particularized inquiry into the facts of each case to determine whether tribal authority exists. In light of the undisturbed findings of the trial court, the Ninth Circuit's conclusion that tribal zoning authority exists over the fee lands in the open area must be reversed.

IV. Jurisdiction Based on Land Tenure Classification Is Neither Irrational nor Arbitrary and Protects the Interests of Both Indians and Non-Indians.

The time has come for this court to establish a bright-line test for civil regulatory control over the land within Indian reservations. The states and their political subdivisions should regulate the fee land and the tribes should regulate the trust lands. This rule would give effect to existing federal laws, the treaties and state law. Jurisdiction based on land tenure classification is not unique to Indian law, *Washington v. Confederated Tribes and Bands of the Yakima Indian Nation,* 439 U.S. 502 (1979)[10] and it works well. It assures that non-members are protected and regulated by governments in which

[10] The Court of Appeals' findings regarding checkerboard jurisdiction are at odds with the teachings of this Court in *Washington v. Confederated Tribes and Bands of the Yakima Indian Nation,* 439 U.S. 502 (1979). In that case, the Yakima Nation challenged the State of Washington's partial assumption of jurisdiction over the Yakima Reservation pursuant to PL 280. The state assumed complete jurisdiction only over reservation fee lands. The Tribe alleged that the land tenure classification violated the equal protection clause and was difficult to administer. In rejecting the Tribe's claims, this Court held:

> "The lines the State has drawn may well be difficult to administer. But they are no more or less so than many of the classifications that pervade the law of Indian jurisdiction. (Citations omitted). Chapter 36 is fairly calculated to further the State's interest in providing protection to non-Indian citizens living within the boundaries of a reservation, while at the same time allowing scope for tribal self government on trust or restricted lands. The land tenure classification made by the State is neither an irrational nor arbitrary means of identifying those areas within a reservation in which tribal members have the greatest interest in being free of state police power. Indeed, many of the rules developed in this Court's decisions in cases accommodating the sovereign rights of the Tribe with those of the States are strikingly similar. (Citations omitted). In short, checkerboard jurisdiction is not novel in Indian law, and does not, as such, violate the Constitution." 439 U.S. 502.

they have a political voice and that judicial remedies are available should those governments regulate improperly or excessively. At the same time, tribal sovereignty over its lands and members is undisturbed.

Yakima County and the State of Washington have exercised civil jurisdiction over non-Indians and the fee lands on the Yakima Reservation since the lands were patented. 25 U.S.C. 349.

This scheme has worked well and there is nothing in the record of either *Whiteside I* or *Whiteside II* to the contrary. In fact, the record in both of those cases indicate that the County has been sensitive to the rights and interests of the Yakima Indian Nation. In *Whiteside I* the County ordered an Environmental Impact Statement as requested by the Yakima Nation. The Tribe, however, chose not to wait and see if the County would approve the subdivision proposed by petitioner Brendale, but chose to sue instead. In *Whiteside II*, the Tribe appealed the decision by the zoning administrator to the Board of County Commissioner and again chose to challenge the County's jurisdiction in federal court rather than exhausting the state remedies available to it. There is no legal reason why this court should not adopt the rule suggested herein, namely, there is no federal law, no treaty right, or inherent authority or sovereignty right which requires an opposite conclusion.

The rights of all of the interested parties are protected by this rule. If Yakima County were to make a regulatory decision concerning fee lands which the Yakima Nation opposes, it would have all of the rights and remedies afforded to any citizen of the State of Washington, as demonstrated by the record. The Tribe is aware of those rights and how to use them. The Tribe successfully sued Yakima County in state court challenging a 1974 development off the reservation on the basis of the State Environmental Policy Act. *Con-*

federated Bands and Tribes of the Yakima Indian Nation v. Johnson, 40 Wn. App. 1032 (1985).

The Puyallup Tribe in the State of Washington has alienated all but 22 acres of an 18,000-acre reservation, *Puyallup Tribe v. Washington Game Department*, 433 U.S. 165, 174 (1977). For the sake of argument, let us assume that the Puyallup Tribe has adopted a comprehensive zoning ordinance which covers all of the original reservation, both fee and trust land. Under the rule adopted by the Ninth Circuit, the Puyallup Tribe has jurisdiction to zone the 17,978 acres of previously alienated land, including that which is located within the city limits of the City of Tacoma, most of which is within the boundaries of the original reservation. Under *Montana*, if the Tribe were to bring an action to void the city's and county's ordinances as was done here, the court would have to determine, after a long trial, whether the city's and county's laws have any "direct effect on the political integrity, economic security, or health and welfare of the tribe". Whereas, the jurisdictional question would be clear today without a trial if the test were based on land tenure classification.

The same would be true with respect to the Suquamish Indian Tribe, which has alienated 63 percent of a 7,276-acre reservation. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 193 (1978).

It is submitted that unless this court adopts a test based on land tenure classification, the Circuit Courts will be confronted with endless appeals asking to define what "direct effect on the political integrity, the economic security, or the health or welfare of the tribe" means. This is similar to the problem faced by this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), when overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court recognized that the "traditional governmental function" test had not worked in that lower courts were reaching opposite conclusions on

the same facts. The same thing is happening with the second part of the *Montana* test.[11]

The test which is suggested would be responsive to the many fact patterns which exist on reservations throughout the United States. It would give the Tribes jurisdiction over their trust lands and, at the same time, would put them on equal footing with all citizens of the United States with respect to their neighbor's land which is controlled by another political subdivision.

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[11] A Ninth Circuit case of particular relevance since it deals with the Yakima Reservation is *Holly v. Totus*, No. 85-4436 (9th Cir.), *cert. denied*, 98 L.Ed.2d 47 (1987), (App. 65-A). In that case, the Court held the Yakima Nation Water Code invalid as to use of excess water by non-Indian fee owners. The Court found that the Tribe had failed to demonstrate that state regulation of such waters threatened or had a direct effect on the political integrity, economic security or health and welfare of the Tribe as required by the *Montana* test. Potentially, then a non-Indian farmer on the Yakima Reservation will be subject to tribal land use regulations and state water use regulations on the same piece of land.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case remanded with directions to enter an order that the County of Yakima possesses exclusive authority to regulate fee land within the reservation. Alternatively, the judgment of the Court of Appeals in *Whiteside II* should be reversed and the case remanded with instructions to enter an order that Yakima County possesses exclusive authority to regulate the use land owned in fee by non-members of the Tribe within the open area of the reservation.

Respectfully submitted,

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September 2, 1988